Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MORRIS B. MYERS,

Petitioner,

vs.

UNITES STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MORRIS B. MYERS, Petitioner Pro Se
Post Office Box 761
Midvale, Utah 84047
Tel.: 801/268 9709

QUESTIONS PRESENTED

1. Whether the 10th Circuit Court's determination that petitioner's appeal was frivolous was correct as a matter of law and in accordance with proper standards, where the record on appeal showed without dispute federal constitutional violations based upon the U.S. 8th Circuit Court of Appeals affirming a district court's order directing a verdict agianst petitioner in petitioner's professional negligence action against his defense attorneys in a state embezzlement prosecution in which petitioner was convicted and the state's evidence showed petitioner borrowed the money allegedly embezzled from a bank, state law at the time was that borrowed money is the borrower's own money, and

petitioner's defense attorneys did not raise the loan defense at any stage of the criminal proceedings.

2. Whether the 10th Circuit Court's determination that petitioner's action in the district court was frivolous was correct as a matter of law and in accordance with proper standards where the record on appeal showed without dispute federal constitutional violations based upon the 8th Circuit Court dismissing as frivolous petitioner's appeal from a district court's judgment dismissing petitioner's Sec. 1983 claim for declaratory and injunctive relief against the state court judges in their official capacities who were responsible for the state court decision on the appeal from the judgment of conviction in the embezzlement prosecution which state

court appellate decision characterized the cash claimed by the state to have been embezzled as cash "borrowed from the bank" but affirmed the conviction anyway.

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PETITION FOR A WRIT OF CERTIORARI
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APPEALS FOR THE TENTH CIRCUIT

Petitioner Morris B. Myers respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of

Appeals for the Tenth Circuit, which held as frivolous petitioner's action in the district court and affirmed the district court's order denying petitioner's motion to vacate the district court's order dismissing petitioner's complaint and denying petitioner's motion to amend the complaint to add a claim against respondent.

OPINION BELOW

The Tenth Circuit's panel decision which determined petitioner's action in the district court to be frivolous and which affirmed the decision of the district court denying petitioner's motion to vacate the district court's order dismissing petitioner's district court action, and denying petitioner's motion to amend the complaint to add a claim against respondent, is unreported;

the decision is reprinted as Appendix A.

STATEMENT OF JURISDICTION

The panel decision of the United States Court of Appeals for the Tenth Circuit is dated April 5, 1994. A petition for rehearing with a suggestion for rehearing en banc was denied on May 31, 1994. The jurisdiction of this Court to review the judgment by writ of certiorari is invoked purusant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall. . .be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On January 8, 1970, the Farmers & Merchants Bank of Aberdeen, South Dakota,

loaned petitioner $4035.60 for which petitioner gave his unsecured promissory note due in thirty days. The proceeds of the loan and note were credited to petitioner's personal checking account the following day and were thereafter drawn out and spent by petitioner.

On September 11, 1972, an indictment was returned in Brown County, South Dakota, against petitioner charging him with embezzling the very cash he borrowed from the bank on January 8, 1970.

[Trial testimony:

Q. [Prosecutor] I show you what has been marked for identificatiojn as Exhibit 2, and ask you if you can identify that?

A. [Farmers & Merchants Bank officer Christensen] That is a

promissory note signed by Morris Myers on January 8, 1970.

Q. The face amount of that note is $4035.60, is that correct?

A. Yes it is.

Q. Did you make out the note at that time in that amount?

A. Yes, I did.

Q. What, if you know, was done with the proceeds of that note?

A. The proceeds of the note were deposited to Mr. Myers' account.

Q. Now I notice you stated that Morris Myers was in your office on January 8; the deposit is shown in the ledger as January 9. Can you explain that?

A. It was late in the afternoon on January 8, and all banks have cut-off-

time, and it is possible that the transaction was completed after the cut-off-time on January 8, so when it was deposited it was recorded as January 9, in the bank statement.]

Petitioner engaged the services of South Dakota attorneys Joe Butler and Ellsworth Evans to defend him against the embezzlement charge. They failed to assert the loan defense in petitioner's behalf even though at the time in South Dakota borrowed money is the borrower's own money. Petitioner was convicted and was sentenced to two years confinement in the South Dakota penitentiary.

The judgment was affirmed on appeal [220 N.W. 535 (S.D. 1974)]. In its decision the appellate court characterized the allegedly embezzled

money as cash "borrowed from the bank."

Petitioner sued attorneys Butler and Evans for malpractice in the U.S. District Court, District of South Dakota, Western Division [Civ. No. 75-5076]. In an amended complaint petitioner alleged ". . .at the close of the state's case-in-chief. . .defendants [Butler and Evans] failed to move the court for a directed verdict on the grounds that the money claimed to have been embezzled by plaintiff [petitioner] was in fact and law loaned or advanced to plaintiff by the Farmers & Merchants Bank of Aberdeen, South Daktoa, and belonged to plaintiff. . ." which allegation was established at trial by the introduction of competent evidence.

The district court directed a

verdict against petitioner and on appeal the 8th Circuit Court of Appeals affirmed stating that "Appellant [petitioner] contends that appellees [Butler and Evans] were negligent in that they failed to properly present at the trial and appellate levels the defense that the money which appellant allegedly embezzled was, in fact, a loan to him and, accordingly, could not sustain a charge of embezzlement.

* * *

"Contrary to the appellant's contention that appellees never raised the loan issue, the Supreme Court of South Dakota was presented with the issue of the sufficiency of evidence to support a conviction of embezzlement. The court noted that it was for the jury to resolve

the factual disputes and that the jury had abviously rejected appellant's version."

In this action petitioner sued the 8th Circuit judges in their official capacities, directly under the Constitution alleging that the action of the court evidenced by its decision at 566 F.2d 398 deprives petitioner of a constitutionally protected property interest in violation of the Fifth Amendment. In the proceeding petitioner sought also to add a claim based upon the 8th Circuit Court of Appeals dismissing as frivolous petitioner's appeal from a district court's judgment dismissing petitoner's Sec. 1983 claim for declaratroy and injunctive relief against the state court judges responsible for

the state court decision in the appeal from the judgment of conviction in the embezzlement prosecution which state court appellate decision characterized the cash claimed by the state to have been embezzled as cash "borrowed from the bank" but affirmed the conviction anyway even though to constitute the crime of embezzlement there must be a wrongful appropriation of the cash in question - an element lacking in this case. Here it is alleged again that petitioner was deprived of a constitutionally protected property interest.

REASONS FOR GRANTING THE WRIT

The record in this matter which includes the entire trial record in the embezzlement prosecution and includes the

appellate briefs of both parties shows conclusively that the loan defense was not asserted at the trial nor was it in the appeal from the judgment of conviction. It further cannot be questioned that had the loan defense been asserted the embezzlement prosecution would have failed and petitioner has a cause of action against Butler and Evans for their negligence in failing to discover and assert the loan defense.

Petitioner also has a cause of action against the judges of the South Dakota Supreme Court under 42 U.S.C., Sec. 1983 where the appellate decision characterizes the money allegedly embezzled as cash "borrowed from the bank" and an affirmance of the judgment would necessarily be based upon a record

devoid of proof of the element of appropriation, a necessary element of the crime of embezzlement, and thus in violation of petitioner's right to due process of law under the Fourteenth Amendment. In re Winship, 397 U.S. 358 (1970).

The operation and effect of the decisions of the 8th Circuit Court of Appeals assailed herein, as well as the decision of the 10th Circuit Court of Appeals in these proceedings, is to extinguish that which by the law of the land is the property of petitioner, and so far as said decisions have that effect, they are unconstitutional and void. A cause of action is a species of property protected by the Due Process Clause of the United States Constitution.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 428 (1950). The limitations inherent in the requirements of due process and equal protection of the law extend to judicial, as well as political, branches of the government so that a judgment may not be rendered in violation of those constitutional limitations and guranties. 46 AmJur2d Judgments, Sec. 17, p. 324.

Petitioner has the right to vindicate his rights in court which is the heart of the constitutional right to due process of law. The actions of the 8th and 10th Circuit Courts of Appeal is the equivalent of denying petitioner an opportunity to be heard upon petitioner's claimed rights. Logan v. Zimmerman Brush

Co., 455 U.S., at 429-30, quoting Bodie v. Connecticut, 401 U.S. 371, 380 (1971).

The testimony quoted ante., pp. 4-6, reflects the content of the only evidence admissible under the indictment which in its essentials reads that petitioner, "on or about the 9th day of January, 1970, . . .while being an attorney, had under his control. . .for the use of another person, to-wit: cash in excess of $50.00, said property being entrusted to him by Jeannette Zick, and he did then and there fraudulently appropriate said property. . ." [A conviction based upon evidence of other crimes not alleged in the indictment is not permitted. Stirone v. United States, 361 U.S. 212 (1960); U.S. v. Herrilll, 877 F.2d 341 (5th Cir. 1989).]

It is the duty of a lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt; to consider viable theories, and develop evidence to support those theories. These are some of the requirements of reasonable performance under the Sixth Amendment. Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991). There is no reasonable professional judgment that would support the omission of Butler and Evans to assert the loan defense in light of the evidence and testimony mentioned ante., pp. 4-6. But for such omission [negligence], petitioner would have been acquitted of the underlying charge.

Borrowed money is the borrower's own money. Cottonwood County Bank v. Case, 125 N.W. 298, 303 (South Dakota, 1910). For cogent analysis see Johnson v. State, 158 Ind.App. 611, 304 N.E.2d 555 (1973), and Matter of Smith, 966 F.2d 1527 (7th Cir. 1992). And Rollin M. Perkins and Ronald N. Boyce, Criminal Law, 3rd ed., 1982, p. 361, where it is stated "[w]hile spending money is a typical method of conversion, if it is the money of another, spending money by the so-called 'borrower' is not conversion, because he is spending his own money. The borrower could not commit embezzlement because it is his property."

In re Winship, supra., requires proof beyond a reasonable doubt of every element of the offense charged in order

that due process requirements are met. The decision of the South Dakota Supreme Court [220 N.W.2d 535] describes the allegedly embezzled cash as cash "borrowed from the bank" the necessary implication of which is that proof of the element of appropriation is missing. Petitioner has a due process right to be free from criminal convictions for crimes the necessary elements of which are not established beyond a reasonable doubt. The South Dakota Supreme Court's decision violates petitioner's due process rights in that it affirms a conviction where proof of the necessary element of appropriation is lacking. Petitioner therefore, has a right of action under 42 U.S.C., Sec. 1983, against the judges of

the South Dakota court, in their official capacities, for declaratory and injunctive relief that was extinguished by the 10th Circuit Court of Appeals. Pulliam v. Allen, 466 U.S. 522 (1984); Shelley v. Kraemer, 334 U.S. 1 (1948); Butz v. Economou, 438 U.S. 478, 489 (1978).

CONCLUSION

For the reasons stated, petitioner respectfully petitions this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Dated June 24, 1994.

MORRIS B. MYERS, Petitioner Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-4170
(D.C. No. 91-CV-1149)
(District of Utah)

MORRIS B. MYERS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS; DONALD P. LAY; THEODORE MCMILLIAN; RICHARD SHEPPARD ARNOLD; JOHN R. GIBSON; GEORGE G. FAGG; PASCO M. BOWMAN, II; ROGER L. WOLLMAN; FRANK J. MAGILL; C. ARLEN BEAM; JAMES B. LOKEN; FLOYD R. GIBSON; GERALD W. HEANEY; MYRON H. BRIGHT; DONALD R. ROSS; and J. SMITH HENLEY, judges of said court, in their official capacities,

Defendants-Appellees.

ORDER AND JUDGMENT

Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff, appearing pro se, appeals two orders entered by the United States District Court for the District of Utah. First, Plaintiff appeals from the district court's Memorandum Order and Opinion entered on August 6, 1993, which denied his Motion to Vacate Order and

*

This order and judgment is not binding precedent, except that under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 19, 1993. 151 F.R.D. 470

not err in denying Plaintiff's Motion for Summary Judgment, dismissing his cause of action, and denying his Motion to Vacate Order and Motion to Amend Complaint.

The judgment of the district court is AFFIRMED.

Entered for the Court

s/Monroe G. McKay
Circuit Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-4170

MORRIS B. MYERS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS; DONALD P. LAY; THEODORE MCMILLIAN; RICHARD SHEPPARD ARNOLD; JOHN R. GIBSON; GEORGE G. FAGG; PASCO M. BOWMAN, II; ROGER L. WOLLMAN; FRANK J. MAGILL; C. ARLEN BEAM; JAMES B. LOKEN; FLOYD R. GIBSON; GERALD W. HEANEY; MYRON H. BRIGHT; DONALD R. ROSS; and J. SMITH HENLEY, judges of said court, in their official capacities,

Defendants-Appellees.

ORDER
Entered May 31, 1994
Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing in banc.

Upon consideration whereof, the

petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court.

ROBERT L. HOECKER, Clerk
By: s/L. Balzano
Deputy Clerk

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MORRIS B. MYERS,

Plaintiff,

-vs-

ORDER AFFIRMING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA; UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS; DONALD P. LAY, THEODORE MCMILLIAN, RICHARD SHEPPARD ARNOLD, JOHN R. GIBSON, GEORGE G. FAGG, PASCO M. BOWMAN II, ROGER L. WOLLMAN, FRANK J. MAGILL, C. ARLEN BEAM, J AMES B. LOKEN, FLOYD R. GIBSON, GERALD W. HEANEY, MYRON H. BRIGHT, DONALD R. ROSS, and J. SMITH HENBLEY, judges of said court, in their official capacities,

Civil No. 91-C-1149W

Defendants.

This matter is before the court on plaintiff Morris B. Myers' objection to the Report and Recommendation of the Magistrate Judge Dismissing Myers' Motion

for Summary Judgment. By order of this court, the case was referred to the Magistrate Judge pursuant to 28 U.S.C. Sec. 636(b)(1)(B). The Magistrate Judge rendered his Report and Recommendation on April 15, 1992. After carefully reviewing the pleadings, memoranda and other papers inthe file of this case, and having considered the law and facts relating to the matter, the court now renders the following decision affirming the Report and Recommendation of the Magistrate Judge.

BACKGROUND

On November 7, 1991, Myers filed the Complaint in this matter, naming as defendants the United States of America, the United States Court of Appeals for the Eighth Circuit, and individual judges

of the Eighth Circuit. At the time he filed the Complaint, Myers did not file a copy of the Summons or any proof of service.

Myers filed an Amended Complaint, in which he named the same defendants, on January 27, 1992. Once again, Myers failed to file a copy of the Summons or other proof that any of the defendants were served.

On February 25, 1992, Myers filed a Motion for Summary Judgment. This time, Myers included a prof of service with hismotion that indicated he had hand delivered a copy of the motion and memorandum in support thereof to the United States Attorney for the District of Utah. The record is barren of any evidence, however, that Myers served the

motion on any of the individual defendants (the judges).

The United States of America filed a Motion to Dismiss Myers' action on March 30, 1991. As one basis for its motion, the United States alleges that Myers did not comply with the procedural requirements for making service of process set forth in Rule 4 of the Federal Rules of Civil Procedure. According to the United States, the record contains no evidence that Myers served a copy of the Complaint and Summons on the Attorney General of the United States. Under Rule 4(d)(5), such service is required to be made via certified mail.

Although the United States has not responded to Myers' Motion for Summary

Judgment, on April 7, 1991, the United States filed a Motion to Strike, or, in the Alternative, for Extension of Time to Respond. As the basis for the motion, the United States alleges Myers failed to comply with local Rule of Practice 202(b)(3).

Apparently in support of its response to the United States' motions, on April 13, 1991, Myers filed an uncaptioned affidavit[1] in which he avers that he caused copies of the original Complaint and Summons to be mailed via certified mail to each of the individual defendants (the judges) on November 8, 1991. Myers also avers that he hand delivered a copy of the Amended Complaint and Summons to the United States Attorney for The District of Utah on January 27,

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1 The local Rules of Practice require that all papers filed with the Clerk of the Court contain certain common identifying information, including the case number, the nature of the document, the person on whose behalf the document is filed, and the address of that person's attorney. D. Utah R. Prac. 105-1(a). Moreover, although not expressly demanded by the rule, affidavits generaly include captions similar to those required on all pleadings, motions and memoranda. See id.

[Whether or not it is appropriate at this point to clarify the record in the trial court, Petitioner herewith points out that the affidavit referred to by Judge Winder as showing service is attached to the Summons as issued by the Clerk.]

1992, and that he mailed via certified mail a copy of the same to the United States Attorney General on January 27, 1992. Myers does not state in the affidavit whether a copy of the original Complaint was served on the United States Attorney or the Attorney General. Nor

does Myers state whether he sent copies of the Amended Complaint and Summons to each of the individual defendants.

On April 15, 1992, the Magistrate Judge entered a Report and Recommendation denying Myers' Motion for Summary Judgment. The Magistrate Judge found hat the record does not contain any evidence that Myers has properly served rocess on the defendants. The Magistrate also found taht there isnothing in the file to show that Myers has served copies of the Motion for Summary Judgment on any of the individual defendants.

This information is not suggested and/or required to make busy work for litigants. Rather, it helps the court understand the relevance of the papers presented for its consideration, and alleviates the confusion that arises when untitled papers are filed without any statement of their relevance to other parts of the record.

Myers has objected to the Magistrate's Report and Recommendation, arguing that Myers committed "no procedural irregularities that justify the Court's denial of the [Motion for Summary Judgment]." Myers reiterates that copies of the original Complaint and Summons were served on each of the individual defendants, and that copies of the Amended Complaint and Summons were served on the United States Attorney for the District of Utah and the United States Attorney General. Myers is silent on the issue of whether copies of his Motion for Summary Judgment were served on the individual defendants.

DISCUSSION

At the outset, the court notes that it agrees with the conclusions of the

Magistrate Judge. However, so a to spell out the requirements that must be met in order for this action to be maintained, the court takes this opportunity to expand upon the opinion of the Magistrate Judge.

A. Service of the Summons and Complaint.

An essential prerequisite to this court's having personal jurisdiction over a defendant is that the plaintiff properly serve the defendant with a copy of the summons and complaint. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirements, of service must be satisfied.") Proper service

requires not only that the defendant be given adequate notice of the suit but, in the absence of consent, the defendant must also be made amenable to service of summons by authorization of statute. Id.

In cases where the United States or its officers are named as defendants, service of process is authorized by Rules 4(d)(4) and 4(d)(5) of the Federal Rules of Civil Procedure. To be effective under Rule 4, however, service of process must comply with the procedural requirements set forth in the rule. For actions against the United States, these requirements include:

1. delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought or that

person's properly designated employee; and

2. sending a copy of the summons and complaint via registered or certified mail to the United States Attorney General.

Fed. R. Civ. P. 4(d)(4). For actions where officers or agencies of the United States are named as a defendants, in addition to complying with the foregoing requirements, the plaintiff must also serve copies of the summons and complaint by certified or registered mail to each of the officers and/or agencies. Fed. R. Civ. P. 4(d)(5).

In the instant case, both in the Complaint and the Amended Complaint, Myers has named as defendants the United States, the Eighth Circuit and the

individual judges of the Eighth Circuit. Thus, in order to make service of process effective as to each of these defendants, Myers must comply with the requirements of both Rules 4(d)(4) and 4(d)(5). This he has failed to do.

Based on the record, the court finds the following flaws in Myers' attempts to make service of process:

1. With respect to the original Complaint, Myers failed to serve copies on the United States Attorney for the District of Utah and the United States Attorney General; and

2. With respect to the Amended Complaint, Myers did just the opposite and, although he served the United States Attorney and Attorney General, he failed to serve the

Eighth Circuit or the individual defendants. [2]

Generally, failure to make timely service in accord with Rules 4(d)(4) and 4(d)(5) is grounds for dismissing an action. See Smith v. McNamara, 395 F.2d 896, 898 (10th Cir. 1968), cert. denied, 394 U.S. 934 (1969). Dismissal of the

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[2] In his objection to the Magistrates' Report and Recommendation, Myers seems to suggest that service was not defective because the individual defendants were served with the original Complaint and the United States Attorney for the District of Utah and United States Attorney General were served with the Amended Complaint. According to Myers, there are no new or different causes of action in the Amended Complaint.

The court rejects this argument. For one thing, proper service of one document does not relieve a party of its obligation to properly serve other documents. Furthermore, the court does not agree with Myers that the original Complaint and Amended Complaint are identical.

Dismissal of the Amended Complaint is not compelled in this case, however, as Myers still has time to make proper service on the individual defendants. Under Rule 4(j), a party has 120 days from the date that the complaint is filed in order to serve the summons and complaint. The Amended Complaint was filed on January 27, 1992. Thus, the defendant has until 120 days after January 27 to complete proper service. Until that time, however, it would be inappropriate for this court to consider Myers' Motion for Summary Judgment. Indeed, this court will not consider that motion or any other motion until proper service has been completed.

B. Failure to Serve the Motion for Summary Judgment.

Aside from failing to execute proper service of process, there is another reason why Myers' Motion for Summary Judgment should not be considered by this court: he failed to properly serve the defendants with copies of the motion. Service of papers other than the complaint is governed by Rule 5 of the Federal Rules of Civil Procedure. Rule requires that unless otherwise provided in another Federal Rule of Civil Procedure, "every written motion other than one which may be heard ex parte. . . shall be served on each of the parties." Fed. R. Civ. P. 5(a).

In the instant case, Myers did not serve his Motion for Summary Judgment on any of the individual defendants. Rather, he only served the United States

Attorney for the District of Utah. It is true that rule 5 provides, "Whenever under [the Federal Rules of Civil Procedure] service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." Fed. R. Civ. P. 5(a). However, when Myers served the government's attorneys with copies of his motion, the government's attorneys had not yet entered an appearance in this matter. Indeed, they had not filed any papers at all. Thus, at the time the motion was served, the individual defendants were not "part[ies] represented by an attorney," and they should have been served directly.[3]

---

[3] In this regard, Myers' citation to Rule 56 of the Federal Rules of Civil Procedure for the proposition that a motion for summary judgment may be filed within twenty days after commencement of an action is irrelevant. Although it permits a party to bring a motion within twenty days following commencement of an action, Rule 56 states nothing that would render Rule 5 of the Federal Rules of Civil Procedure inapplicable to motions for summary judgment. Nor does rule 56 affect the requirement that all parties be properly served before they are amenable to the jurisdiction of the court.

Conclusion

For the foregoing reasons, this court fully adopts and affirms the Report and Recommendation of the Magistrate Judge.

Accordingly,

IT IS HEREBY ORDERED as follows:

1. The Report and Recommendation of the Magistrate Judge in this case dated April 15, 1992, is adopted by this court.

2. The objections by the plaintiff Morris B. Myers to the Report and Recommendation are overruled.

3. The plaintiff Morris B. Myers' motion for Summary Judgment is denied for the reasons stated in this order.

4. This order shall serve as the court's ruling on this matter and no further order need by prepared by counsel.

Dated this 11th day of May, 1992.

s/David K. Winder
David K. Winder
United States District
Judge

Mailed a copy of the foregoing to the following named counsel this 11th day of May, 1992.

Michael F. Olmstead, Esq.
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Ogden, UT 84401

Glen R. Dawson
Assistant U.S. Attorney
476 U.S. Courthouse
Salt Lake City, UT 84101

s/Lois G. Elder
Secretary

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

MORRIS B. MYERS,
Plaintiff,

v.

U.S.A., UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS, et al.,
Defendants.

ORDER OF DISMISSAL

Civil No 91-C-1149W

An amended complaint was filed on January 27, 1992 in the above-entitled matter. No returns of summons or any other indicia of service has been filed. Pursuant to the provisions of Rule 4(j) of the Federal Rules of Civil Procedure,

IT IS ORDERED that the plaintiff's complaint is dismissed without prejudice and the clerk shall send notice of this order to the plaintiff.

Dated: August 5, 1992.

BY THE COURT
S/David K. Winder
David K. Winder,
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MORRIS B. MYERS,

Plaintiff,

-vs-

UNITED STATES OF AMERICA et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 91-C-1149W

This matter is before the court on Plaintiff Morris B. Myers' ("Plaintiff") Motion to Vacate Order and Motion to Amend Complaint. The court dismissed this matter without prejudice on August 5, 1992 under Rule 4(j) of the Federal Rules of Civil Procedure. Plaintiff's motion includes nothing that would necessitate a response from defendants, much less the granting of said motion. The court has carefully reviewed the file in this matter and the arguments advanced

in Plaintiff's motion. Being fully advised, the court is convinced Plaintiff's motion is without merit.

Accordingly, and good cause a appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion to Vacate Order and Motion to Amend Complaint is denied.

Dated this 6th day of August, 1993.

s/David K. Winder
David K. Winder
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR
DISTRICT OF UTAH
CENTRAL DIVISION

MORRIS B. MYERS,
Plaintiff,
V.
UNITED STATES OF AMERICA,
Defendant.

MOTION TO ALTER, AMEND OR VACATE AUGUST 6, ORDER

Case No. 91-C-1149W

Plaintiff herewith moves the Court for an order altering, amending, or vacating MEMORANDUM DECISION AND ORDER dated and filed August 6, 1993, upon the following grounds and for the following reasons.

[A FRCiP 59(e) motion must clearly establish either a manifest error of law or fact or present newly discovered evidence. Federal Deposit Ins. Corp. v.

Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)]

The Court's August 5, 1992 ORDER OF DISMISSAL recites "An amended complaint was filed on January 27, 1992 in the above-entitled matter. No returns of summons or any other indicia of service has been filed. Pursuant to the provisions of Rule 4(j) of the Federal Rules of civil Procedure, etc." The so-called Amended Complaint contains no changes of substance. In the opening complaint I, in error, alleged that defendants "as judges of the said United States Eighth Circuit Court of Appeals, are officers and employees of the United States." The Amended Complaint does not include this allegation. The Amended Complaint was not served on the

individual judges because they were sued only in their official capacities which is tantamount to suing the United States of America itself. Brandon v. Holt, 479 U.S. 464, 471-72. Therefore, service was completed as required by FRCiP 4(d)(4) upon the United States of America and "indicia" of such service filed on April 13, 1992. It may be that the "indicia" or return has been removed from the file; I do, however, have in my possession a copy that bears a copy of the Clerk's stamp which upon request will be delivered to the Court. The "indicia" of service shows that Summons and Amended Complaint was served on January 27, 1992.

An examination of plaintiff's filings will indicate beyond question that the amendments requested are

justified under the rule that the limitations inherent in the requirements of due process and equal protection of the law extend to judicial, as well as political, branches of the government, so that a judgment may not be rendered in violation of these constitutional limitations and guaranties. 46 AmJur2d Judgments Sec. 17, p. 324.

WHEREFORE, plaintiff moves the Court to enter its order vacating its August 6, 1993 MEMORANDUM DECISION AND ORDER, and that an order be entered granting plaintiff's MOTION TO VACATE ORDER and MOTION TO AMEND COMPLAINT.

DATED August 15, 1993.

s/Morris B. Myers
MORRIS B. MYERS

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

MORRIS B. MYERS,

Plaintiff,

-vs-

UNITED STATES OF AMERICA, et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 91-C-1149W

This matter is before the court on Plaintiff Morris B. Myers' ("Plaintiff") Motion to Alter, Amend or Vacate August 6, 1993 Order. The court dismissed this matter without prejudice on August 5, 1992 under Rule 4(j) of the Federal Rules of Civil Procedure. Almost one year later Plaintiff filed a Motion to Vacate Order and Motion to Amend Complaint. On August 6, 1993, the court denied that motion, holding that "[p]laintiff's motion includes nothing that would necessitate a response from defendants

much less the granting of said motion." Mem. Decision and Order at 1 (August 6, 1992). Plaintiff now has filed the instant motion to amend that ruling. Plaintiff's motion to amend is nothing more than an attempt to reargue issues already decided by the court in its previous rulings. Plaintiff's motion contains no new argument or evidence that would require the consideration, much less the granting, of his motion. In fact, plaintiff's motion to amend is without any merit whatsoever. If plaintiff wishes to pursue this litigation further he should do so by appeal to the Tenth Circuit Court of Appeals.

Accordingly, for the foregoing reasons, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion to Alter, Amend or Vacate August 6, 1993 Order is denied.

Dated this 23 day of August, 1993.

S/David K. Winder
United States District Judge